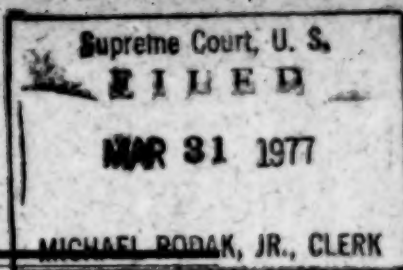


No. 76-961



In the Supreme Court of the United States

OCTOBER TERM, 1976

RAMESH GANGADEAN, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that an in-court identification should have been excluded because it followed an impermissibly suggestive pre-trial identification.

After a bench trial in the United States District Court for the District of Arizona, petitioner was convicted of conspiring to possess marijuana with the intent to distribute it, in violation of 21 U.S.C. 846 and 841(a)(1) and (b). He was sentenced to three years' imprisonment, to be followed by a special parole term of five years. The court of appeals affirmed (Pet. App. A).

The evidence at trial, as summarized by the court of appeals (Pet. App. 2a-8a), showed that on May 27, 1975, United States Forest Service personnel observed a small private airplane, carrying two persons, land at a remote

mountain airstrip near Young, Arizona. After two passengers had left the airstrip, a Forest Service officer walked over to the parked aircraft and noticed that it was loaded with several cardboard boxes. He alerted customs officials.

By the time customs agents arrived on the scene, the airplane had departed. The agents discovered a stack of cardboard boxes covered by a tarpaulin about 100 feet from the airstrip. The boxes contained marijuana. A team of agents from the Customs Service and the Drug Enforcement Administration immediately established both air and ground surveillance of the boxes containing the marijuana and of the surrounding area.

The surveilling agents observed two armed men approach the boxes containing the marijuana at approximately 2:00 a.m. the next day. When the agents turned a high-powered spotlight on the two men, the men immediately started firing their weapons at the agents. A brief gun battle ensued, after which Charles Joubin, one of petitioner's co-defendants, was found lying wounded in the brush clutching an AR 15 rifle. Petitioner was arrested a short time later while travelling on the road leading to the airstrip. At the time of his arrest, petitioner was driving a camper vehicle that various members of the surveillance team had seen in the vicinity several times during the preceding day.

At trial, the manager of a Phoenix gunstore, Carlton Wilbar, positively identified petitioner as the purchaser of the AR 15 rifle found with Joubin after the shootout at the airstrip (Tr. 338). On cross-examination, Wilbar stated that, while he was waiting to testify, a government agent asked him whether he recognized anyone in the courtroom. In response to the agent's inquiry, Wilbar pointed to petitioner (Tr. 342-343).

Petitioner argues (Pet. 3-4) that the circumstances surrounding Wilbar's identification of him while Wilbar was waiting to testify were impermissibly suggestive and that Wilbar's in-court identification therefore should have been excluded. But as the court of appeals correctly concluded (Pet. App. 15a-16a):

[T]here was no evidence of improper conduct on the part of law enforcement officials or the United States Attorney which would support a conclusion that the confrontation between the eye witness [Wilbar] and [petitioner] was impermissibly suggestive. This is not a situation in which law enforcement officials conducted a show-up. See *Neil v. Biggers*, [409 U.S. 188, 195]. Instead, this is a situation in which, by happenstance and the circumstances of trial, the eye witness confronted the defendant.

Indeed, the circumstances surrounding Wilbar's first identification of petitioner were no more suggestive than those attending his latter testimonial identification—both were made in the courtroom only a few minutes apart.

Moreover, even when an identification is made under suggestive circumstances, it does not necessarily follow that a subsequent in-court identification must be suppressed. Rather, "each case must be considered on its own facts" to determine whether the earlier "identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification" (*Simmons v. United States*, 390 U.S. 377, 384). See also *Neil v. Biggers*, *supra*, 409 U.S. at 196-197; *Coleman v. Alabama*, 399 U.S. 1, 5-6. Applying that test to this case, there was ample basis for the district

court's conclusion that Wilbar's testimonial identification was reliable and had not been induced by his confrontation with petitioner a few minutes before Wilbar took the stand. As the court of appeals observed (Pet. App. 16a):¹

Under the totality of the circumstances, the identification procedure used created little likelihood of misidentification. The eye witness had almost thirty minutes in the store to observe [petitioner]. He was certain of his identification even after extensive cross-examination. The confrontation occurred about six months later. Although Wilbar's prior description was general, it was consistent with [petitioner's] features. Finally, the district judge, after observing [petitioner], commented that [petitioner's] features were so distinctive that it was entirely reasonable that someone, after having observed him for thirty minutes, would be able to remember him six months later.

¹Contrary to petitioner's contention, there is no conflict between the decision here and *Brathwaite v. Manson*, 527 F. 2d 363 (C.A. 2), certiorari granted, 425 U.S. 957, argued November 29, 1976, in which the Second Circuit held that evidence of a pre-trial identification made under impermissibly suggestive circumstances must be suppressed whenever use of the suggestive identification procedure was not required by exigent circumstances. Unlike *Brathwaite*, this case involves the admissibility of an in-court identification that was reliable under the standard sanctioned by this Court in *Simmons v. United States*, *supra*, *Coleman v. Alabama*, *supra*, and *Neil v. Biggers*, *supra*. The government did not attempt to introduce evidence of Wilbar's identification of petitioner, made while Wilbar was waiting to testify. Rather, Wilbar's earlier identification was disclosed while defense counsel was cross-examining Wilbar in an apparent attempt to discredit Wilbar's testimony.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

MARCH 1977.